NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

JAN 20 2006

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

KELLY HAROLD WILSON,

Petitioner - Appellant,

v.

J. W. FAIRMAN, JR., Warden; et al.,

Respondents - Appellees.

No. 04-16019

D.C. No. CV-99-01711-JKS

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
James K. Singleton, Senior District Judge, Presiding

Argued and Submitted October 21, 2005
Submission Vacated October 24, 2005
Resubmitted January 20, 2006
San Francisco, California

Before: WALLACE, TROTT, and RYMER, Circuit Judges.

Kelly Harold Wilson appeals from the district court's denial of his 28 U.S.C. § 2254 habeas petition. We affirm.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

The court of appeal's decision that Wilson was not subjected to custodial interrogation in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966), did not involve an unreasonable application of clearly established Supreme Court precedent. *See* 28 U.S.C. § 2254(d)(1). The court reasonably concluded that the officers' comments making clear their belief that Wilson was guilty would not have "affected how a reasonable person in [Wilson's] position would perceive his . . . freedom to leave." *Stansbury v. California*, 511 U.S. 318, 325 (1994) (per curiam); *see also Oregon v. Mathiasan*, 429 U.S. 492, 495-96 (1977) (per curiam). Although the officers' refusal to answer some of Wilson's questions on the ground that they were "in control," as well as their denials of Wilson's requests to smoke and hear from Wilson's girlfriend, weigh in favor of a determination that Wilson was in custody, the court of appeal's decision to the contrary was not objectively unreasonable in light of Wilson's voluntary trip to the police station, the officers' repeated advisements that he was free to leave and not under arrest, and the officers' instructions on how to exit. *See Mathiason*, 429 U.S. at 495 (noting voluntariness and advisements that suspect was free to leave as factors weighing against custody); *Yarborough v. Alvarado*, 541 U.S. 652, 124 S. Ct. 2140, 2149-50 (2004) (holding that the state court's application of the custody test was reasonable despite "differing indications").

Nor did the court of appeal unreasonably apply Supreme Court precedent in determining that the officers' alleged promises and threats rendered Wilson's confession involuntary. It was not objectively unreasonable for the court to conclude that neither the officers' statements regarding leniency, nor their comments about the potentially severe prison term Wilson faced for his crimes, caused Wilson's "will [to be] overborne at the time he confessed." *Haynes v. Washington*, 373 U.S. 503, 513 (1963) (citation and internal quotation marks omitted). Wilson's contention that his swollen eye rendered his confession involuntary finds no support in the record.

Finally, Wilson procedurally defaulted his objection to the trial court's exclusion of Robinson's impeachment testimony, and therefore federal habeas review of Wilson's challenge is barred. *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991). Contrary to Wilson's assertion, the record does not show that his counsel moved to admit testimony about the "blackmail ring" at trial.

AFFIRMED.